SLOVER & LOFTUS
ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N.W.
WASHINGTON, D. C. 20036

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE

TELEPHONE:
(202) 347-7170
FAX:
(202) 347-3619
WRITER'S E-MAIL:
rdr@sloverandloftus.com

February 29, 2000

BY HAND

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: STB Ex Parte No. 582,
Public Views on Major Rail Consolidations,
Statement of Western Coal Traffic League

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an unstapled original and ten copies of the Statement of Western Coal Traffic League.

Also enclosed is a 3.5-inch diskette in WordPerfect 8.0 format containing the comments.

Mark W. Schwirtz, accompanied by the undersigned, will appear before the Board on March 9, 2000, on behalf of Western Coal Traffic League.

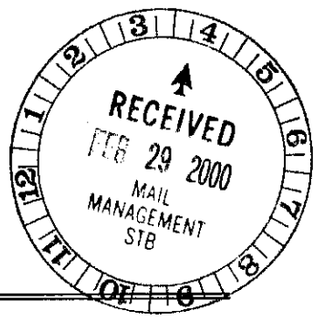
Please contact the undersigned if there are any questions.

Sincerely,

Robert D. Rosenberg

Robert D. Rosenberg
An Attorney for Western
Coal Traffic League

RDR:kaw
Enclosures



BEFORE THE
SURFACE TRANSPORTATION BOARD

In the Matter Of:	)	
PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS	)	STB Ex Parte No. 582

STATEMENT OF WESTERN COAL TRAFFIC LEAGUE

PRESENTED BY MARK W. SCHWIRTZ

MANAGER-SAFETY, HEALTH, ENVIRONMENTAL AND FUELS

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

AND

TREASURER, WESTERN COAL TRAFFIC LEAGUE

WESTERN COAL TRAFFIC LEAGUE
Mark D. Werner, President
Gerald L. Lybarger, Vice President
Mark W. Schwirtz, Treasurer

William L. Slover
Donald G. Avery
Robert D. Rosenberg
Slover & Loftus
1224 Seventeenth Street, NW
Washington, DC 20036
(202) 347-7170

Attorneys for the
Western Coal Traffic League

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, NW
Washington, DC 20036

Dated: February 29, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

STATEMENT OF WESTERN COAL TRAFFIC LEAGUE

The Western Coal Traffic League ("WCTL") appreciates this opportunity to appear before the Surface Transportation Board ("Board" or "STB") to offer its views on the subject of major railroad consolidations and the present and future structure of the North American railroad industry.

I am Mark W. Schwirtz. I am Manager-Safety, Health, Environmental and Fuels of Arizona Electric Power Cooperative, Inc., based in Benson, Arizona. I also presently serve as a WCTL officer.

WCTL is a voluntary organization, whose membership consists entirely of utility shippers of coal mined west of the Mississippi River that is transported by rail. WCTL members presently ship and receive in excess of 100 million tons of coal by rail each year. A list of WCTL's regular members is attached as Exhibit A.

Since its formation in 1976, WCTL has been active continuously in proceedings before the Board and its predecessor, the Interstate Commerce Commission, involving rail mergers, rulemakings, and other matters, particularly those involving the shipment of coal and/or the interests of captive shippers. Particular focuses of activity have included market dominance,

revenue adequacy, industry cost of capital, coal and non-coal rate guidelines, the rail cost adjustment factor and its productivity adjustment, and costing issues. WCTL has also been active in the legislative process and participated actively in the Congressional hearings that culminated in both the Staggers Rail Act of 1980 and the ICC Termination Act of 1995.

WCTL, as well as a number of its individual members, actively opposed both the Burlington Northern/Santa Fe and Union Pacific/Southern Pacific mergers. In the BN/SF merger proceeding, WCTL specifically criticized the ICC's "one case at a time" approach and the failure to consider the "downstream" or "cumulative impacts and cross over effects" of the merger, namely, the UP/SP merger. In the UP/SP merger, WCTL specifically warned of the potential for adverse impacts on service, especially with respect to coal. Unfortunately, WCTL's concerns regarding the mergers, particularly the service problems with UP/SP, were fully realized.

Following the UP/SP debacle, numerous parties warned of the potential for service disruptions in the Conrail control proceeding. Norfolk Southern and CSX claimed to have taken such concerns into account, even to the point of delaying the consummation of their takeover. Nonetheless, major service disruptions ensued, causing substantial damage to shippers, the carriers themselves, and the public as a whole.

In light of the above, WCTL applauds the Board for having recognized in the BNSF/CN merger proceeding that the

downstream impacts of the merger should also be considered and that there should be an explicit focus on the likely effects on rail service. Recent history plainly establishes the wisdom of the Board's new focus.

WCTL understands that the BNSF/CN merger is not the direct focus of this proceeding. WCTL has not yet taken any formal position on that merger proposal, the application for which has not even been filed. Nonetheless, the proposed merger, and the prospect that other carriers would seek to effect their own transcontinental mergers in response, provides a valid impetus for considering the matters raised by the Board, and WCTL offers the following general comments.

49 U.S.C. § 11324 mandates that a consolidation of Class I railroads can be approved only if it is consistent with the public interest, which must include consideration of the effect of the transaction on the adequacy of transportation to the public and whether the proposed transaction will have an adverse effect on competition among rail carriers. The Board is empowered to impose conditions to achieve these important objectives.

WCTL submits that too little attention has been paid in recent mergers to shippers' interests in receiving adequate, competitive service. While the carriers have routinely made claims of reduced costs and improved efficiencies, service, and competition, the standard result has been write-ups of asset values to reflect hefty premiums paid in mergers, reduced

operating efficiency associated with merger implementation, diminished service, resulting increases in variable costs, and reduced competitive alternatives. Regrettably, the relevant question for shippers is not "How have you been helped by recent rail mergers?", but instead "How have you been harmed?".

Despite the very real problems with most of the recent rail mergers, there has been very little sense of accountability on the part of the carriers for their failures. Claims and projections are freely made when it serves the carriers' interests, but when carriers fail to live up to those representations, the burden falls in large part on shippers and the public in general. The carriers may eventually be able to claim that they have managed to get their affairs in order and announce that their merger has been a long-term success, but the success has been achieved primarily at the expense of others that got reduced service or no service, had to pay more for it, were unable to make sales or receive goods, or experienced other harms.

Recent experience with both the UP/SP merger and the Conrail control transaction demonstrates that the Board has had very limited ability to fix operational problems resulting from mergers once they occur on a real-time basis. Measures such as competitive access and/or divestiture should be adopted on a permanent, not just temporary, basis so that the carriers will be held responsible for their errors and shippers will have some protection if carriers fail to deliver on their representations.

The presence of more meaningful remedies should help prompt carriers to proffer more realistic claims regarding the costs, impacts, and benefits associated with their mergers, to make good on those claims, and to prevent merger implementation problems from arising.

In contrast, protecting shippers with rates tied to regulatory costs and/or cost factors from having to pay higher rates as a result of operational problems associated with rail mergers should be a simple and straightforward matter. The applicable calculations should be made as if the service disruptions or deviation from operating representations did not occur.

In that regard, WCTL filed a complaint in Finance Docket No. 33726 almost a year ago challenging UP's accounting treatment for increased costs resulting from the UP/SP merger. WCTL also very recently filed comments in Ex Parte No. 290 (Sub-No. 4) asking that the effects of the UP/SP merger be excluded from the RCAF productivity adjustment. Without such a correction, the productivity adjustment would serve to protect the railroads from, or even affirmatively reward them for, their inefficiency through reductions in the RCAF productivity adjustment. The issue is particularly important because the effect of the UP/SP service crisis on the 1997 and 1998 data and the effect of Conrail transaction problems on the future 1999 and 2000 data may cause the productivity adjustment to go negative

(that is, the adjusted RCAF would increase faster than the unadjusted RCAF).

These service and cost-related problems are further exacerbated by recent remarks from the Class I railroads reported in such publications as the Journal of Commerce and the Wall Street Journal proposing to adopt congestion pricing in light of current railroad capacity constraints. The nation's unprecedented economic expansion presented the industry with a golden opportunity to expand and upgrade its infrastructure, which the large Class I railroads have for the most part squandered by using the capital that was in ample supply to pursue mergers at inflated values that they were subsequently unable to manage effectively. The industry is thus responsible for any capacity problems that exist. Its failure to manage its affairs effectively in an era of deregulation should not provide any basis for forcing shippers to pay higher rates.

WCTL acknowledges that there may be some shippers that may claim to have received some benefit from the recent rail mergers. However, WCTL submits that these are primarily shippers who have choices, particularly those who utilize intermodal services on a large-scale basis and have competitive options.

Captive shippers, especially electric utilities shipping coal, have seen their needs receive less priority from railroads intent on gaining market share from trucks. A number of WCTL members, including AEPCO, are captive, and their high-volume coal movements are a very profitable source of business to

the railroads. However, their level of service has suffered so that the railroads can give intermodal movements, which are reportedly much less profitable, a higher operating and business priority. A number of unit train coal shippers are experiencing difficulty obtaining meaningful contract service commitments from their carriers. The increase in railroad size and scale resulting from recent mergers has also reduced the level of customer attention afforded coal shippers.

WCTL would think that business considerations alone would dictate that service to coal shippers would be an important priority for rail carriers. However, coal shippers feel that they have suffered disproportionately as a result of recent mergers in terms of service. Accordingly, the Board should ensure that service to coal shippers, who typically do not have feasible transportation alternatives, is not compromised in any future rail merger.

WCTL believes that it is appropriate and instructive to consider how electric mergers are treated at the Federal Energy Regulatory Commission. Usually standard measures include: prohibition on writing up asset values to reflect merger premiums; rate freezes or other measures to protect long-term or cost-based customers from having to pay higher rates as a result of mergers, as well as frequent settlement arrangements that allow customers to share directly in savings projected to result from the merger; and an emerging obligation in some cases to transfer control of transmission assets to an independent,

regional transmission operator, in addition to an independent obligation for functional unbundling of transmission and generation operations.

Obviously, these measures stand in stark contrast to what the Board has ordered in recent merger cases, where relief has essentially been limited to those shippers that can make a difficult showing that they were, or would have been able to be, served by both of the two carriers that have chosen to merge.

WCTL urges the Board to recognize that the railroad industry is already highly concentrated as a result of the recent round of mergers, that customers and competition have generally suffered as a result, and that maintaining meaningful competition in light of any further consolidation requires proactive measures. In particular, the Board should be willing to impose conditions that will allow shippers, particularly captive ones, to share in the supposed benefits of mergers and provide meaningful protection against negative impacts, even for those harms that may be difficult to demonstrate conclusively before they occur. Relief should not be completely withheld where it may be difficult to develop a remedy that precisely offsets the harm. The balance should shift in favor of protecting captive shippers, as opposed to make sure that a shipper does not derive any improvement as a result of a merger condition. The fact that a requested condition may serve to augment the existing level of competition should be a virtue, not a fatal flaw. Moreover, meaningful relief should be available where merging carriers fail

to honor representations that they made in seeking approval for their merger.

In order to provide a measure of accountability and a semblance of competition, particularly for those shippers, like WCTL's members, who have at best very limited competitive options, conditions to be considered and imposed where appropriate in any subsequent mergers could and should include the following:

- Safeguards to prevent shippers from having to shoulder any cost burdens associated with such mergers or their aftermath, including write-up of asset values to cover merger premiums, and exclusion of the effects of merger implementation difficulties from calculations of variable costs, cost of capital, and the RCAF productivity adjustment;
- Meaningful protection against degradation in service, which should include a duty to facilitate service over a carrier's tracks by other parties on a permanent basis if service is significantly degraded from either pre-merger levels or from the levels that applicants claim they will achieve;
- Obligation to maintain and expand the adequacy of transportation capacity, subject to the same remedy specified above if capacity becomes

inadequate or investment representations are not fulfilled;

- Obligation to demonstrate that the merger will provide relief to parties that have suffered adverse effects from prior mergers or their implementation; where such effects stem from mergers involving carriers other than the applicants, this obligation could encompass having the Board impose "conditions on conditions" with respect to non-applicants;
- Duty to quote rates on a non-through rate basis in order to facilitate the availability of bottleneck rate relief; this duty should be combined with a duty to preserve open and viable "gateways" so that mergers will not reduce competitive options, particularly for new entrants or line extensions by existing competitors;
- Affirmative obligation to provide meaningful access to at least one and preferably at least two competitors, including a short-line, over significant segments of the applicants' service territory, including segments containing customers that are otherwise significantly captive, or the equivalent (possibly subject to a reciprocal obligation of the competitor);

Imposition of conditions such as described above would result in mergers that have much more potential to promote the adequacy of transportation to the public, preserve competition among the remaining rail carriers, and protect shippers in the event that representations are not fulfilled. The resulting competition would reward those carriers that are able to compete efficiently and honor their representations. Conversely, mergers that are unable to satisfy the conditions specified above are unlikely to have a benevolent effect on competition or otherwise satisfy the public interest.

Exhibit A

WESTERN COAL TRAFFIC LEAGUE MEMBERS

Arizona Electric Power Cooperative, Inc.

Central Louisiana Electric Company, Inc.

Central and South West Services, Inc.

City of Austin, Texas

City Public Service Board of San Antonio

Colorado Springs Utilities

Kansas City Power & Light Company

Lower Colorado River Authority

MidAmerican Energy Company

Minnesota Power

Nebraska Public Power District

Omaha Public Power District

Reliant Energy (formerly Houston Industries, Inc.)

Western Resources, Inc.

Wisconsin Public Service Corporation